

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA, INC., et al.,

Defendants.

No. C10-1823-JLR

MICROSOFT'S 3/30/12 MOTION TO
FILE DOCUMENTS UNDER SEAL

**NOTED FOR:
Friday, April 20, 2012**

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Limited Portions of Microsoft's Motion for Summary Judgment of Breach of Contract ("Motion for Summary Judgment"); and
- (2) Exhibits 12 and 15-19 to the Declaration of Christopher Wion in Support of Microsoft's Motion for Summary Judgment (the "3/30/12 Wion Declaration").

MICROSOFT'S 3/30/12 MOTION TO FILE
DOCUMENTS UNDER SEAL - 1

No. C10-1823

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1 Microsoft seeks to file the foregoing materials under seal because they contain
 2 information that has been identified by either Microsoft or Motorola as confidential business
 3 information under the terms of the operative protective order issued in this case and/or in
 4 separate litigation between the parties.

5 For these reasons, and as more fully described below, compelling reasons exist for
 6 protecting the confidentiality of these documents. Microsoft respectfully requests permission
 7 to file the above-referenced documents under seal and that the Court direct such documents to
 8 remain under seal. Microsoft is filing a redacted version of its Motion for Summary Judgment
 9 as part of the public record.

10 II. FACTS & AUTHORITY

11 A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to 12 File Confidential Information under Seal.

13 Pursuant to the Protective Order issued by the Court on July 11, 2011, Microsoft is
 14 permitted to file materials designated by either party as Confidential Business Information¹
 15 under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a)
 16 and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a)
 17 provides:

18 Any information submitted in pre-trial discovery or in a pleading, motion, or
 19 response to a motion in this action, either voluntarily or pursuant to order, and
 20 which is asserted by a supplier to contain or constitute Confidential Business
 21 Information shall be so designated by such supplier in writing...and shall be
 22 segregated from other information being submitted. Documents shall be clearly
 23 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]
 24 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO
 25 PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of
 this action, such information, whether submitted in writing or in oral testimony,

1 “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not
 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 amounts or source of any income, profits, losses, or expenditures.” Protective Order Regarding the Disclosure
 and Use of Discovery Materials (ECF No. 72), ¶1.

shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in support of a dispositive motion upon a “compelling showing that the public’s right of access is outweighed by the interests of the public and the parties in protecting the court’s files from public review.” *Id.*; *see also Kakakama v. City and Cnty of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). In determining whether compelling reasons exist, the Court weighs relevant factors such as “the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.” *Dish Network, L.L.C. v. Sonicview USA, Inc.*, 2009 U.S. Dist. LEXIS 73857, *2-3 (S.D. Cal. Aug. 20, 2009), *citing Pintos v. Pac. Creditors Ass’n*, 565 F.3d 1106, 1116 n.6 (9th Cir. 2009). Where the material sought to be sealed “includes information about proprietary business operations, a company’s business model or agreements with clients, there are compelling reasons to seal the material because possible infringement of trade secrets

1 outweighs the general public interest in understanding the judicial process.” *Selling Source,*
 2 *LLC*, 2011 U.S. Dist. LEXIS 49664, at *18.

3 Further, while the public generally enjoys a right to inspect and copy public records, “it
 4 is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court
 5 has supervisory power over its own records and files, and access has been denied where court
 6 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications,*
 7 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper
 8 purpose” is where the commercial business information at issue is sought to be used as a
 9 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*
 10 (denying access to copies of tapes played at trial and noting that courts refused public access to
 11 their files where granting such access might “become a vehicle for improper purposes,”
 12 including causing a litigant competitive harm). Compelling reasons exist to grant Microsoft’s
 13 motion to seal.

14 **B. Compelling Reasons Exist for Filing and Maintaining under Seal Documents that**
 15 **Disclose Non-Public and Commercially Sensitive Information.**

16 1. The Above-Referenced Exhibits to the 3/30/12 Wion Declaration Should Be
 17 Filed under Seal

18 Exhibit 16 to the 3/30/12 Wion Declaration is a true and correct copy of the Rebuttal
 19 Testimony of Walter Leland Rossini, submitted in ITC Investigation No. 337-TA-752, *In the*
 20 *Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components*
 21 *Thereof* (hereafter, the “752 Action”). Mr. Rossini is Microsoft’s Senior Director of
 22 Marketing for Xbox. Mr. Rossini’s Rebuttal Testimony in the ‘752 Action includes non-public
 23 and commercially sensitive information regarding the adverse impact on Microsoft, its
 24 partners, and consumers, if Motorola’s efforts to obtain an exclusion order in the ITC as to the
 25 Xbox were successful. Mr. Rossini’s Rebuttal Testimony was designated as Confidential
 Business Information subject to the protective order issued in the ‘752 Action and should

1 remain similarly protected in this action. Public disclosure of the business information
2 contained in Exhibit 16 would create an unreasonable risk of commercial harm to Microsoft
3 without any countervailing benefit to the public. Based on the foregoing, compelling reasons
4 exist to maintain Exhibit 16 under seal.

5 Exhibit 12 consists of true and correct excerpts from the transcript of the hearing in the
6 '752 Action that were contemporaneously designated as confidential for purposes of that
7 action. Exhibit 12 includes testimony provided by various Motorola witnesses as well as a
8 third party witness, Jennifer Ochs. The testimony provided by Motorola's witnesses discloses
9 information that Motorola asserts is confidential, including descriptions of various licensing
10 agreements with third parties. Ms. Ochs is the director of IP litigation of third party Marvell
11 Semiconductor, Inc. The testimony of Ms. Ochs discloses confidential commercial
12 information of Marvell, including as it relates to Marvell's customers and its licensing
13 negotiations with Motorola. Accordingly, compelling reasons exist to maintain Exhibit 12
14 under seal.

15 Exhibits 15, 17, 18, and 19 are documents that Motorola has designated as containing
16 confidential business information. Exhibit 15 is a copy of the Direct Testimony of Kirk
17 Dailey, submitted in the '752 Action. Exhibit 17 consists of excerpts from the March 20, 2012
18 deposition of K. McNeill Taylor, Jr., taken in this action. Exhibit 18 is a copy of Motorola's
19 license agreement with a third party. Exhibit 19 consists of excerpts from the March 20, 2012
20 30(b)(6) deposition of Mr. Taylor, taken in this action. Under the terms of the Protective
21 Order, because Motorola has designated these documents as containing confidential business
22 information, Microsoft is required to file such documents under seal.

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2. Microsoft's Motion for Summary Judgment Includes References to Confidential Information Contained in the Above-Referenced Exhibits, which Should Be Redacted

Microsoft's Motion for Summary Judgment includes references to and descriptions of the confidential information contained in the above-referenced exhibits to the Wion Declaration. To the extent that the Court determines that those exhibits may be filed under seal, and should remain under seal, Microsoft's Motion for Summary Judgment should be redacted to avoid disclosure of the confidential information contained in those exhibits. Microsoft is seeking to file under seal only those limited portions of its Motion for Summary Judgment that contain information that should be protected from public disclosure under the governing standards outlined above. While a complete and unredacted version of the Motion for Summary Judgment is being filed under seal, Microsoft is filing a redacted version as part of the public record.

III. CONCLUSION

Microsoft has filed the above-referenced documents under seal based on its good faith belief that such material qualifies for protection under the terms of the Protective Order and the applicable Court rules. A [Proposed] Order Granting Microsoft's 3/30/12 Motion to File Documents Under Seal has been submitted herewith.

DATED this 30th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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